B.C.D. 03-54

JUN 11 2003

EMPLOYER STATUS DETERMINATION
Midwest Maintenance Service

This is the determination of the Railroad Retirement Board concerning the status of Midwest Maintenance Service (MMS) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.)(RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.)(RUIA).

On March 24, 2003, Mr. Joe Nichols, President, MMS, provided the Board with answers and documentation in response to an RRB contractor questionnaire. MMS provides inspection and maintenance service on locomotives, rail cars, forklifts and locomotive cranes primarily for nonrailroad employers. In addition to Mr. Nichols, MMS has 14 employees. MMS sends invoices for services, provides its own supplies, sets its own hours and locations, usually on site, and pays employment taxes on its employees. MMS employees are supervised by Mr. Nichols.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(1)(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49.
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> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

MMS clearly is not a carrier by rail. Further, the evidence shows that it is not under common ownership or control with any rail carrier. Therefore, MMS is not a covered employer under the Acts.

This conclusion leaves open, however, the question of whether the individuals who perform work for MMS under its arrangements with rail carriers and nonrail carriers who do business with rail carriers should be considered to be employees of those railroads rather than independent contractors. Section 1(b) of the

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Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work.

The evidence submitted shows that the work of the 15 individual employees of MMS is not performed under the direction of any railroad employee or employees, but is performed under the terms of their employment with MMS; accordingly, the control test in paragraph (A) is not met. Moreover, under an Eighth Circuit decision consistently followed by the Board, the tests set forth under paragraphs (B) and (C) do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

Thus, under Kelm the question remaining to be answered is whether MMS is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has any opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F.

2d 1004 (Ct. Cl. 1977), at 1012; and whether the contractor engages in a recognized trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir. 1968) at 341. While these may be rather close questions in some cases where the contractor does not have permanent employees but rather hires individuals on a per job basis, it is apparent that MMS is in the business of providing services to many customers, only a very small percentage of which are connected to the rail industry. The record indicates that MMS is engaged in a recognized trade or business. Accordingly, it is the opinion of the Board that MMS is an independent business.

Because MMS engages in an independent business, Kelm would prevent applying paragraphs (B) and (C) of the definition of covered employee to this case. Accordingly, it is the determination of the Board that the individuals employed by MMS to provide services to railroads are not employees of railroads and that the services they provide to those railroads are not covered under the Acts.

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